IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 1414 OF 1979

Nandkishore Lalbhai Mehta)
of Bombay Indian Inhabitant,)
residing at 301, Jupiter Apartment,)
Cuffe Parade, Bombay 400 005.).. Plaintiff

Versus

1. New Era Farbics Pvt.Ltd.,)
a Company registered under the)
provisions of the Companies Act,)
1956 having its Registered)
Office at Moghul Lane, Tulsi)
Pipe Road, Matunga,Bombay-400 016)

2. Progressive Exports Pvt.Ltd.)
a Company registered under the)
provisions of the Companies Act,)
1956 having its Registered)
Office at Bajaj Bhavan, Nariman)
Point, Bombay 400 020.)

3. Concord Motors Ltd.)
a Company registered under the)
provisions of the Companies Act,)
having its Registered Office)

at "D" Block, Shivsagar Estate,)
Dr. Annie Besant Road, Worli,)
Bombay 400 018.)..Defendants

Mr. Hiralal Thakker a/w Ms. Mamta Saad & Mr. Faisal Sayyed i/b. M.K.Ambalal & Co. for for the Plaintiff.

Mr. Navnit Shah a/w S.Vasoodew & M.M.Vashi i/b. M/s. M.P.Vashi & Associates for the Defendants.

CORAM: S.K.SHAH,J.

JUDGMENT RESERVED ON : 17.11.2005

JUDGMENT PRONOUNBCED ON 12.12.2005

ORAL JUDGMENT :

1. This is the suit for specific performance of the agreement for sale and in the alternative, for refund of earnest money and for damages/compensation.

2. The property involved in this suit (hereinafter referred to as "the suit property") admeasuring 11,244 square yards (0501.45 square metres) or thereabouts bearing New Survey No.179 and Cadastral Survey No.561 of Mahim Division together with the buildings and messuages standing or lying thereon situate at Greater Bombay under "G" Ward Nos. 5546-47-48 and Street Nos. 22-23 and 24 at Lady Hardinge Road, Mahim and the land

admeasuring Cadastral Survey No.560 together with buildings and messuages standing or lying thereon situate at Greater Bombay under "G" Ward as described in Exhibit "A" to the plaint.

3. In October, 1977, both the defendants were desirous of selling their respective right, title and interest in their ownership and possession of the suit land. The negotiations were held between the Plaintiff and the Defendants Nos. 1 and 2 and it was resolved under an agreement for sale by Defendants Nos. 1 and 2 in favour of the Plaintiff of their respective rights, title and interests in the suit land. The said agreement was recorded by the Plaintiff by his letter dated 19.10.1977 which was confirmed by the Defendants at the foot thereof. The material terms of the agreement were as under :-

(1) The consideration of the land was lumpsum price of Rs.78,06,600/-. Out of the said amount of Rs.11,50,000/- was to be paid as earnest by the Plaintiff to the Defendants in the following manner :-

(a) Rs.7,50,000/- were to be paid on confirmation of the letter dated 19.10.77 by the Defendants;

(b) The balance of Rs.4,00,000/- were to agreed to be paid by the Plaintiff on or about 24.10.1977 time being the essence of the contract;

(2) The sum of Rs.7,50,000/- was to be utilised by the Defendant No.1 for the purpose of carrying out the consent terms arrived at in the High Court Suit No.236 of 1968 and the consent terms arrived at in the Small Causes Court Suit.

(3) One half of the balance consideration money was to be paid by the Plaintiff to Defendants on :

(a) the permissions under Sections 22 and 27 of the Urban Land (Ceiling & Regulation) Act, 1976 being obtained;

(b) the permission for conversion into the residential user of the suit property being obtained;

(c) after the defendants have duly settled

with their labour and obtained the Labour Authorities' permission as provided;

(d) on vacant possession of the suit land being handed over to the Plaintiff, the balance consideration was agreed to be paid by equal quarterly instalments within one year from the date of possession of the land being handed over to the Plaintiff;

(e) the sale of the suit land was to be subject to -

(i) permission being obtained under Sections 22 and 27 of the said Urban Land (Ceiling & Regulation) Act, 1976

(ii) subject to the Defendants being able to settle with their labour and the Defendants' labour agreeing to sell the suit property to the Plaintiff;

(iii) subject to the said property being converted from industrial zone into residential zone;

(f) If No Objection Certificate and the change of user and the permissions provided were not obtained within the period of 9 months from the date of the letter (agreement) and if the defendants were not able to settle with their labour and get them to agree to the same, the Plaintiff would not be bound to complete the sale and the agreement would survive only to the extent of return for earnest money which would be paid within six months from the expiry of the aforesaid period of 9 months with interest at the rate of 18% per annum and till the said sum with interest thereon is duly and fully repaid, the Defendants would not be entitled to do any act, deed, matter or thing whereby or by reason whereof the security created in favour of the Plaintiff would be affected or jeopardised in any manner whatsoever;

(g) In order to secure the repayment of the sum of Rs.11,50,000/-, the Defendants would hypothecate by an unattested Deed of

Hypothecation the machines set out in the said agreement

(h) The letter dated 19.10.1977 written by the Plaintiff to the defendants containing these terms of the agreement was duly confirmed by the Defendants at the foot of the said agreement/ letter.

By a letter of hypothecation also dated 19.10.1977, the Defendants duly hypothecated the machines set out therein as security for repayment of the amounts mentioned above.

3. Pursuant to the said agreement, the Plaintiff paid a sum of Rs.7,50,000/- as part of earnest money and on 20.10.1977, the Defendants acknowledged receipt of the cheque for the said amount. The Defendants also further stated in the said letter, that a decree in the Small Causes Court Suit would be obtained at the earliest and the Defendants' Advocate would hand over the cheque for Rs.7,50,000/- to the Advocate for lessees of the suit property. Thereafter, on 24.10.1977, the plaintiff's Advocate sent another

cheque for Rs.4 lakhs by way of payment of the remaining amount of earnest money. Pursuant to the agreement, the suit in the Small Causes Court was compromised by a consent decree passed on 7.11.1977 and the Defendants by their Advocate's letter dated 8.11.1977, intimated to the Plaintiff about the compromise decree and about the sum of Rs.7,50,000/- paid by the Plaintiff having been utilsied by the Defendants for payment as provided in the suit agreement dated 19.10.1977. By the same letter, the Defendants also intimated to the Plaintiff the balance of Rs.4 lakhs was appropriated as per the suit agreement. By the said letter, the Defendants also communicated to the Plaintiff that the Plaintiff had meetings with the Defendants' Advocate and it was requested to the Advocate to call upon the Defendants to take up the settlement with the labour and also on various permissions to be obtained.

4. It is further undisputed that the plaintiff's Architect in consultation with the defendants and their representatives had made applications to the authorities under the Town Planning Act for change of user of the said property from industrial to residential zone. The Plaintiff by his Advocate's letter dated 16.11.1977 also requested the defendants to forward to them the requisite letters by the

concerned authorities authorising the transfer of the said property from industrial user into the residential use. Thereafter by another letter dated 16.11.1977, the Advocate for the defendants forwarded to the Advocate for the plaintiff a copy of the defendants' letter dated 8.11.1977 addressed to the Mill Mazdoor Sabha, Bombay intimating the said Mill Mazdoor Sabha about the agreement for sale of the suit property and requesting them to give consent to the same.

5. It is alleged by the plaintiff that thereafter it appears that the defendants received letter dated 5.12.1977 from the said Mill Mazdoor Sabha alleging that they were not agreeable to the defendant no.1 selling the said Mill premises to the Plaintiff. The defendants' Advocate by letter dated 15.12.1977 forwarded a copy of the letter dated 5.12.1977 and further intimated the Plaintiff that in view of the alleged refusal by the labour union, the suit agreement for sale between the parties stood cancelled and the defendants would return the sum of Rs.11,50,000/- with interest thereon. The plaintiff immediately orally and then by his Advocate's letter dated 23.12.1977 requested the defendants' Advocate and the defendants to hold meeting of the parties to consider the letter dated 5.12.1977. The Plaintiff

alleged that inspite of such request having been made, the defendants by their letter dated 19.12.1977 already informed the Town Planning authorities that the defendants did not desire to have the user of the said property converted from industrial or commercial to residential zone and that they were withdrawing the application made by the plaintiff's architect for such change of user. The plaintiff alleged that the defendants have already started resorting to acts contrary to the terms and conditions of the suit agreement. The plaintiff by letter dated 6.1.78 stated that he would attend on 9.1.1978 at about 11 a.m. the factory premises of the defendant No.1 so that he could be furnished with all necessary papers, correspondence and documents with the said Mill Mazdoor Sabha. By that letter, the defendants were also requested to write necessary letters to authorities under the Town Planning Act to keep the matter pending and not to treat the withdrawal of any application for change of user. The plaintiff alleged that instead of waiting till 9.1.78 for the meeting to be held at the factory premises, the defendants by their reply dated 7.1.1978 stated that they have handed over to the plaintiff a complete copy of the correspondence between them and the representatives of the Union. The plaintiff alleged that inspite of this correspondence, the defendants by their Advocate's

letter dated 16.12.78 stated that in view of the letter received by them from Mill Mazdoor Sabha, the agreement for sale dated 19.10.1977 between the parties stood cancelled and that the defendants would be returning the sum of Rs.11,50,000/- as provided in the agreement. The defendants stated in the said letter that the labour union's refusal contained in the letter dated 5.12.1977 was final.

6. The plaintiff further alleged that by plaintiff's Advocate's letter dated 4.2.1978, in reply to the defendants'' leter dated 16.1.1978, recorded the correct facts and that in fact negotiations between the parties were going on . However, the defendants by their letter dated 9.2.1978 forwarded Bank draft of Rs.1 lakh in favour of the plaintiff's Advocate purporting to be a part-payment of the principal sum of Rs.11,50,000/-. The plaintiff alleged that they however did not encash the draft and communicated the defendants by reply dated 10.2.1978 that the agreement for sale was valid and subsisting and thus returned the draft of Rs.1 lakh to the defendants. The plaintiff alleged that thereafter various attempts were made by and between the parties to try and amicably settle the matter by negotiations, but the negotiations did not fructify.

7. The plaintiff alleges that at all material times and even now he was ready and wiling to perform his part of the agreement for sale and to carry out the same and pay the balance price as per the agreement. He further contends that the defendants however wrongfully backed out of the said agreement for sale on the false and wrong pretext. The plaintiff further alleges that at the instigation of the defendants in collusion with the said Mill Mazdoor Sabha has allegedly refused to give its permission for the same. The plaintiff further alleges that the said refusal of the Mill Mazdoor Sabha to consent to the sale has been instigated by the defendants and the same is collusive and that the same is made a false pretext to enable the defendants to back out of the said agreement dishonestly and wrongfully. The plaintiff further alleges that in any event, the suit agreement provided that the sale was subject to the defendants being able to settle with their labour and the defendants' labour agreeing to the sale contemplated under the agreement was intended and meant for the benefit of the plaintiff. The plaintiff further alleges that therefore by letter dated 19.4.1978, addressed to the defendants' Advocate he waived the benefit of the stipulation under the agreement for sale and expressed his willingness to complete the sale although the defendants' labour did not agree to the said sale.

The defendants however by their Advocate's reply dated 26.4.1978 wrongfully denied that the stipulation regarding the defendants' labour was for the plaintiff's benefit and that the plaintiff could waive the said stipulation. The plaintiff alleges that he was ready and wiling to waive and/or waived the said condition. The plaintiff further alleges that the defendants have dishonestly backed out of the suit agreement for sale and are refusing to perform and carry out their part of the said agreement for sale on false plea, pretext and excuse. Hence, the plaintiff filed the suit for specific performance of the suit agreement and in the alternative prayed for refund of earnest money with interest and also for damages/compensation.

8. Both the defendants by their common Written Statement resisted the suit. While admitting to have executed the suit agreement in favour of the plaintiff, they contend that by letter dated 5.12.1977 of Mill Mazdoor Sabha, the labour had refused to consent for the sale of the suit property to the plaintiff as the same was communicated by them to the plaintiff by their letter dated 15.12.1977 and also communicated to the plaintiff that the suit agreement stood cancelled. They further contend that a meeting between the Union of the 1st defendant's labour and

the plaintiff was held on 9.1.1978 and the matter was discussed and even thereafter the representative of the Union of the 1st Defendant's labour by its letter dated 10.1.1978 addressed to the 1st defendant recorded that the labour was not agreeable to the sale as contemplated in the suit agreement. The defendants had forwarded that letter to the plaintiff along with their letter dated 16.1.78. As such, the contention of the defendants is that the said agreement for sale stood cancelled and the plaintiff is only entitled to refund of earnest money with agreed rate of interest. They contend that along with the defendant No.1's attorneys' letter dated 9.2.1978, the plaintiff was sent a draft of Rs.1 lakh which was towards the refund of earnest money of Rs.11,50,000/-, but the plaintiff returned the same. They contend that since the suit agreement stood cancelled and terminated, there is no valid and subsisting agreement for sale between the parties. The plaintiff, therefore, is not entitled to the relief of specific performance.

9. They further contend that since the defendant No.1 labour union by their letter dated 5.12.1977, refused to consent for sale, the suit agreement stood cancelled and, therefore, the defendant No.1 was well within his right to the Town Planning Authorities that they did not desire to change the user of the suit

property from industrial or commercial to the residential.

10. The defendants further deny that the plaintiff was at all material times ready and willing to carry out his part of the agreement. They contend that since the suit agreement stood cancelled on the 1st defendant's labour refusing to agree to the sale of the suit land, the question of readiness and willingness on the part of the plaintiff did not arise. They further deny that the refusal of the latter to the sale of the suit property was instigated by the defendants on the false pretext to enable the defendants to resile from the suit agreement as alleged by the plaintiff. They further deny that the plaintiff suffered any loss or he is entitled to any damages/compensation claimed by the plaintiff. They therefore contend that the plaintiff's suit for specific performance be dismissed as also the plaintiff's claim for damages/compensation.

11. In view of these pleadings, the following issues are framed against which I have recorded my findings for the reasons below :-

ISSUES **FINDINGS**

1.	Whether the letter dated 19th October 1977 records the Agreement arrived at between the Plaintiff and the Defendants for sale of the suit property on the terms and conditions contained therein as alleged in paragraph 19 & 20 of the Plaint ?	In the affirmative.
2.	Whether by letter of hypothecation dated 19.10.1977 Defendants duly hypothecated the machines set out therein as a security for repayment of the amount of Rs.11,50,000/- as alleged in paragraph 21 of the Plaint ?	In the affirmative
3.	Whether the Plaintiffs paid to the Defendants aggregate sum of Rs.11,50,000/- as earnest money as provided in the said Agreement for Sale dated 19.10.1977 as alleged in paragraph 22 of the Plaint ?	In the affirmative
4.	Whether the Plaintiff was at all material times and even now is ready and willing to carry out his obligations under the said Agreement dated 19.10.1977 as alleged in paragraph 33 of the Plaint ?	In the affirmative
5.	Whether the condition in the Agreement for Sale which provided that the sale was subject to the Defendants being able to settle with their labour and obtaining their consent to the sale was intended and meant for the benefit of the Plaintiffs as alleged in paragraph 33 of the Plaint ?	In the affirmative
6.	Whether the Plaintiffs were entitled to waive and have in fact waived the benefit of the said condition referred to in Issue No.5 above ?	In the affirmative
7.	Whether the alleged refusal of Mill Mazdoor Sabha to consent to the sale of the suit property to the Plaintiffs has been instigated by the Defendants and/or the same is collusive and/or made a false pretext to enable the Defendants to back out of the said	In the affirmative

	Agreement for Sale as alleged in paragraph 33 of the Plaint ?	
8.	Whether the Defendants have committed breach of the Agreement for Sale as alleged in paragraph 33 of the Plaint ?	In the affirmative
9.	Whether the Defendants are bound and liable to specifically perform and carry out their part of the Agreement for Sale and to complete the sale as stated in paragraph 34 of the Plaint ?	In the affirmative
10.	In the event of Court not granting specific performance of the said Agreement for Sale, whether the Defendants are bound and liable to refund the sum of Rs.11,50,000/- with interest thereon at the rate of 18% per annum as claimed in paragraph 35 of the Plaint ?	Does not arise.
11.	Whether the Plaintiffs are entitled to have the repayment of the said sum of Rs.11,50,000/- plus interest aggregating to Rs.12,67,100/- with further interest duly secured by a a charge on the suit property as claimed in paragraph 36 of the Plaint?	Does not arise.
12.	Whether the Defendants are bound or liable to pay to the Plaintiffs a sum of Rs.78,06,600/- or any other sum as and by way of damages for breach of the said Agreement for Sale as claimed in paragraph 38 of the Plaint?	Does not arise.
13.	Whether the Agreement for Sale dated 19.10.1977 stood cancelled and terminated for the reasons alleged in paragraphs 16 & 17 of the Written Statement ?	In the negative.
14.	What reliefs the Plaintiffs are entitled to ?	As per order.

ISSUE NO.1:

12. As stated hereinabove, after negotiations were

held, the Plaintiff had sent the details of the terms and conditions agreed during the negotiations by reducing them into writing in the form of a letter dated 19.10.1977 and they were sent to the Defendants Nos. 1 and 2 and in approval thereof, both the defendants had signed the letter. The said agreement in the form of a letter is produced at Exhibit "P-1". This has not been disputed by the defendants.

13. In this regard, however, without there being any pleading, a contention was raised by the learned Counsel for the defendants that the agreement was not a concluded contract. The thrust of the agreement is on clause 10 of the agreement which mentions as under :-

> "The other terms and conditions and default Clauses as are usual in an Agreement for Sale, will be incorporated in the said Agreement and all the terms mentioned hereinabove and in the Agreement for Sale to be executed as herein provided will bind all persons, firms or companies, claiming by through or under me."

It was, therefore, vehemently submitted on behalf of the defendants that as the terms and conditions of agreement for sale were to be decided subsequent to

the suit agreement, Exhibit "P-1" and therefore his submission is that the suit agreement at Exhibit "P-1" was not a concluded contract or concluded agreement.

14. The learned Counsel for the defendants also relied on the admission given by the plaintiff's witness (P.W.1) N.L. Mehta that further agreement was also to be made. The P.W.1, Mr. Mehta also admitted in cross-examination that the suit agreement was conditional agreement. The learned Counsel for the defendants pointed out that three conditions were incorporated in the agreement which were to be performed and the suit agreement was subject to those three conditions which were put. Those three conditions were as under :-

> (1) The sale shall be subject to the permission being obtained under Sections 22 and 27 of the Urban Land (Ceiling & Regulation) Act, 1976;
>
> (2) The sale shall be subject to the property being converted from industrial zone to residential use; and
>
> (3) The sale shall be subject to your (defendants) being able to settle with your (defendants) labour and labour agreeing to the sale contemplated herein.

It is vehemently submitted on behalf of the defendants that the suit agreement was subject to these conditions and therefore conditional agreement cannot be specifically performed.

15. As against this, the learned Counsel for the plaintiff submits that there is no pleading to the effect that the suit agreement was not a concluded agreement or a concluded contract. Moreover, he further submits that in the Written Statement, it was however admitted by the defendants that this concluded agreement was executed between the parties and it stood cancelled as a result of the labour union of the defendants not having consented for the sale.

16. The learned Counsel for the plaintiff also submitted that future contract that was to be executed as per clause 10 of the suit agreement was a formal contract and that does not mean that the suit agreement was not a concluded contract.

17. In support of the contentions raised by the defendants, the learned Counsel for the defendants relied on a decision of the Supreme Court in the case of **Ganesh Shet vs. Dr. C.S.G.K.Setty & Others**, reported in (1998) 5 SCC 381. The facts of the said case before the Apex Court were, in fact, different.

There was overwhelming evidence that the contract was not concluded. The draft agreement was waiting confirmation and it is under those circumstances that it was held that the agreement was not concluded. In the present case, however, the terms and conditions that are set out in the suit agreement, Exhibit "P-1" are confirmed by the defendants and no further confirmation is required. Therefore, the submission made by the learned Counsel for the defendants is not acceptable.

18. On the other hand, the learned Counsel for the plaintiffs relied on the decision of the Apex Court in the case of **Kollipara Sriramulu vs. T.Aswatha Narayana**, reported in AIR 1968 SC 1028 in support of his contention. The relevant observations of the Apex Court are as under :-

> "A mere reference to a future formal contract in an oral agreement will not prevent a binding bargain between the parties. The fact that the parties refer to the preparation of an agreement by which the terms agreed upon are to be put in a more formal shape does not prevent the existence of a binding contract. There are, however, cases where the reference to a future contract is made in such terms as to show that the parties did not

> intend to be bound until a formal contract is signed. The question depends upon the intention of the parties and the special circumstances of each particular case. The fact of a subsequent agreement being prepared may be evidence that the previous negotiation did not amount to a concluded agreement, but the mere fact that persons wish to have a formal agreement drawn up does not establish the proposition that they cannot be bound by a previous agreement."

In the facts of the present case, not only that the suit agreement is not oral, but it is in writing and duly confirmed by the defendants. There is nothing on record to indicate that the parties did not intend to be bound by the suit agreement until formal contract is signed. Clause 10 of the suit agreement, Exhibit "P-1" clearly indicates that an agreement for sale to mean that agreement would be executed incorporating other usual terms and conditions including the default clause. In fact, the substantial terms and conditions were already confirmed by the defendants as are incorporated in the suit agreement, Exhibit "P-1". The substantial terms and conditions were about the property which was the subject matter of the agreement, the sale consideration, the clauses regarding handing over vacant possession, regarding

payment of earnest money and the balance consideration have been incorporated which indicate that all material terms and conditions which are required for an agreement for sale were agreed upon between the parties in the form of suit agreement, Exhibit "P-1". This agreement also incorporated the three conditions which were required to be performed before a regular agreement of sale was to be executed. Considering the terms incorporated in the agreement for sale as is the term usual in clause 10, in fact, indicated that it was a sale deed or conveyance deed. This is so because even the default clauses were included in the suit agreement. There is provision in the suit agreement as to what should happen if the plaintiff fails to perform his part of the contract as also what should happen if the defendants fail to perform their part of the contract,via. satisfying the three conditions which are incorporated in the agreement. Therefore, there is no substance in the submissions made on behalf of the defendants. In fact, it was a concluded contract.

19. Even the condition for obtaining a permission under the provisions of the Urban Land (Ceiling & Regulation) Act as incorporated in the suit agreement cannot be resorted to by the defendants to say that the suit agreement was a contingent contract as held

by the Apex Court in the case of **Mrs. Chandnee Widya Vati Madden vs. Dr. C.L.Katial and Ors.** reported in AIR 1965 SC 978. Under these circumstances, the suit agreement was a concluded contract between the plaintiff and the defendants and the agreement was on the terms and conditions that are incorporated in the suit agreement, Exhibit "P-1". This issue shall have to be answered in the affirmative.

ISSUE NO.2 :

20. It is undisputed that pursuant to the agreement, a hypothecation deed was also executed by the defendants in favour of the plaintiff. The plaintiff’s witness, Mehta (P.W.1) stated in his evidence that original hypothecation deed could not be traced. However, he had Xerox copies and the same has been produced at Exhibit P-22. It is duly signed by M.P.Agarwal for and on behalf of Defendant No.1. This evidence has gone unchallenged. This hypothecation deed dated 19.10.1977 was by way of security for payment of the amount of Rs.11,50,000/- which was paid by the plaintiff to the defendants by way of earnest money. This issue shall have to be answered in the affirmative.

ISSUE NO. 3:

21. It is further undisputed that a sum of Rs.11,50,000/- as earnest money as provided in the suit agreement of sale dated 19.10.1977 has been paid by the plaintiff to the defendants. The plaintiff's witness, Mr. Mehta (PW-1) has stated in his evidence that the amount of Rs.7,50,000/- was agreed to be paid on confirmation of the letter dated 19.10.77 by the defendants and Rs.4,00,000/- were agreed to be paid on or before 24.10.1977. Accordingly, Rs.7,50,000/- were paid by the plaintiff to the defendants by two cheques, one for Rs.6,00,000/- and another for Rs.1,50,000/- and the receipt thereof was duly signed by the Advocate for the defendants at the foot of the suit agreement, Exhibit P-1. This has not been disputed. Mr. Mehta (PW-1) has further stated that the amount of Rs.4,00,000/- was paid by way of two cheques, one for Rs.1,00,000/- and another for Rs.3,00,000/- as per the suit agreement and the cheques were sent under the letter dated 24.10.1977. This statement on oath has not been denied by the defendants. That fact was not denied in the written statement. In the circumstances, the plaintiff has proved that the amount of Rs.4,00,000/- was also paid to the defendants. Thus, together the plaintiff had paid to the defendants Rs.11,50,000/- by way of earnest money as agreed under the agreement of sale

dated 19.10.1977, Exhibit "P-1". This issue therefore has to be answered in the affirmative.

ISSUE NOS. 5 & 6 :

22. It is alleged by the plaintiff that the term of getting cosnent from the labour to sell the suit property was for the benefit of the plaintiff. The said condition is as under :-

> "The sale shall be subject to your being able to settle with your labour and your labour agreeing to the sale contemplated herein."

The plaintiff's witness, Mr. Mehta (PW-1) has stated that this condition was for the benefit of the plaintiff. The defendants' witness, R.K.Agarwal (DW-1) has however stated that this condition was for the benefit of both the plaintiff and the defendants. It is to be noted that the suit property which was agreed to be purchased by the plaintiff from the defendants is the land. It is undisputed that on this land there was standing the factory premises where the workers were working. When the plaintiff had purchased the land and structure, it was obvious that settling with the labour for the purpose of closing the factory was for the benefit of the plaintiff alone

and not for the benefit of the defendants. At any rate, even taking into consideration the interpretation as is tried to be given by the defendants, it cannot be said that this condition was not for the benefit of the plaintiff. It was obviously for the benefit of the plaintiff if not alone for the plaintiff but was also for the plaintiff. In this regard, it is also to be noted that one of the terms of the suit agreement was that it was the responsibility on the defendants to give vacant possession. Such vacant possession could have been given by the defendants to the plaintiff only after settling with the labour enabling them to remove the factory. This also makes it clear that this condition was for the benefit of the plaintiff for getting vacant possession of the suit property.

23. The next question is whether the plaintiff was entitled to waive and has, in fact, waived the benefit of the said condition of settling with the labour and getting their consent. In this regard, the plaintiff's allegation is that the plaintiff by his Advocate's letter dated 19.4.1978, addressed to the defendants' Advocate, stated that he waived the benefit of the stipulation under the agreement for sale and expressed his willingness to complete the sale although the defendants' labour did not agree to

the said sale. The said letter dated 19.4.78 which is produced at Exhibit P-16 addressed by the plaintiff's Advocate to the defendants' Advocate. The letter mentions that the plaintiff was prepared to waive the stipulation although Union of the defendants' employees refused to agree to the sale in pursuance of the agreement arrived at between the plaintiff and the defendants The letter also further clarifies that the stipulation with respect to the Union agreeing to the sale was for plaintiff's benefit and it was for the plaintiff to waive the benefit of the said stipulation and that the plaintiff waived the benefit of the said stipulation and desired to complete the sale although the said Union is not agreeable to the sale in pursuance of the suit agreement. Therefore, this letter makes it abundantly clear that the said condition was not only for the benefit of the plaintiff, but the plaintiff had also waived the said condition and expressed willingness to purchase the property without the defendants settling with the labours and labours not having consented to the sale. Thus, the waiver of this condition by the plaintiff was clear and unambiguous. In the circumstances, both the issues shall have to be answered in the affirmative.

ISSUES NOS. 4, 7, 8 & 13.

24. In the written statement, the defendants had put forth only one ground to cancel the agreement and that ground was that the labour union did not agree for the sale of the factory premises. That refusal by the labour union to the defendants was communicated by the defendants by their letter dated 5th December, 1977 and the said refusal was in turn communicated by the defendants to the plaintiff by their letter dated 15th December, 1977 which was annexed with the union's letter dated 5th December, 1977. The letter of 15th December, 1977 is produced at Exhibit P-5 annexed with which is a copy of the letter of Union addressed to the defendants dated 5th December, 1977. The Union's letter mentioned that they were not agreeable to the selling of the Mill premises and, therefore, they were unable to give their consent to the said Mill premises. The letter also further mentions that there was no question of settling payment of the workers' dues as proposed by the defendants.

25. It is alleged by the plaintiff that this refusal by the labour union was instigated by the defendants. Thus, it was a false pretext to enable the defendants to back out of the suit agreement of sale.

26. In this regard, it is necessary to note the terms agreed upon between the parties in the suit agreement dated 19.10.1977. Those terms are already set out hereinabove. As per clause 6 of the suit agreement, Exhibit P-1, the sale was subject to three conditions: (1) regarding getting permission under the Urban Land (Ceiling & Regulation) Act, 1976 (hereinafter referred to as the "ULC Act", (2) subject to the property being converted from industrial use to residential use and (3) the defendants being able to settle with their labour and the labour agreeing to sale contemplated in the agreement. This clause specifically mentions that these conditions were to be complied with obviously by the defendants within a period of nine months from the date of the agreement. It is worth noting that the defendants did not wait for the period of 9 months and they chose to cancel the agreement by their letter dated 15th December, 1977 itself i.e. within a period of about two months from the date of the suit agreement. In that letter, the ground referred to for cancellation was that the labour union had refused their consent for sale of the factory premises. The words used in this condition of clause 6 are as under :-

> "Subject to your being able to settle with your labour and your labour agreeing to the

sale contemplated herein."

Much stress was laid on behalf of the defendants to the words "being able to settle". It is vehemently contended on behalf of the defendants that despite the best efforts by the defendants, the defendants were not able to settle with the labour and, therefore, labour did not consent for the sale of the factory premises and therefore in view of clause 6 of the suit agreement, the agreement of sale stood cancelled and the plaintiff was only entitled to get refunded of the earnest money of Rs.11,50,000/- paid by them.

27. This submission however, is not obviously accepted. Although the period of nine months was given to the defendants for settling with the labours, they chose to cancel the agreement without making any efforts to get the matter settled with the labour. Being able to settle contemplated serious and honest efforts on the part of the defendants to settle with the labour and not a perfunctory attempt. There is absolutely no evidence led on behalf of the defendants to show what efforts they had made for settling with the labour to comply with the conditions as incorporated in the agreement of sale. What appears in fact is that the defendants admittedly used part of

the earnest money i.e. Rs.7,50,000/- for satisfying their obligation under the consent terms filed in the Suit No.236 of 1968 in the High Court for getting their title to the suit property and soon after it was done. It appears the defendants backed out from the suit agreement. This is further evident from the fact that the defendants had withdrawn their application made before the concerned authority for change of user of the premises although the plaintiff kept on saying that the agreement did not stand cancelled and requested them to keep it open pointing out that there was long period of 9 months available for pursuing labour to agree for the sale. It however appears that the defendants backed out from the suit agreement on the sole pretext of Union having not agreed for the sale without the defendants having made any efforts to settle with the labour.

28. It would be necessary to examine whether it was really true that the Union had not consented for the transfer. This stand was taken by the defendants by their letter dated 15.12.1977, Exhibit P-5, along with which they had sent to the plaintiff the Union's letter dated 5.12.1977 which is annexed to the Exhibit P-5. The plaintiff has challenged this letter dated 5.12.1977 to be untrue and doctored letter. In the first place, the agreement was by both the defendants.

Therefore, the defendant No.2 must have been made known as to what had happened as to the settlement with the labour and obtaining their consent. The defendant No.2 however, were not informed about the letter dated 5.12.1977 sent by the Union refusing to consent. It is evident from the defendant No.2's letter dated 14.12.1978 which is produced at Exhibit P-38. This letter was addressed by the defendant no.2 to the defendant No.1's Mill Mazdoor Sabha. By this letter, the Mill Mazdoor Sabha was requested to know the exact position of the sale of the suit property. They further told the Mill Mazdoor Sabha that they were removing the factory either to Andheri or some other place in Bombay or remove the machinery to their sister concern at Surat. This is to provide alternative employment to the workers. The letter further mentioned that those workers who are not interested in alternative employment would be paid their full dues. The contents of this letter indicate two things, firstly that the defendant No.1 did not take the defendant No.2 into confidence about their discussion with the Mill Mazdoor Sabha with regard to the compliance of one of the conditions incorporated in the suit agreement about settling with the labour by obtaining their consent and secondly, that as the defendant No.2 could understand, there was a proposal to the Mill Mazdoor Sabha obviously with co-operation

of defendant No.1 that they were removing the factory to Andheri or some other place in Bombay and removing the machinery to Surat and provide alternative employment to the workers and that those workers who are not interested in alternative employment would be paid their full dues. This, therefore, shows that the Mill Mazdoor Sabha representing the labour working in the defendant No.1's factory had, in fact, not refused to consent and settle the matter with the defendant No.1.

29. In this regard, it is pertinent to note that Mr. M.P.Agarwal was concerned with the suit agreement representing the defendants. It is he who has signed the agreement. He however did not remain with the defendants since after 1980 as there were some differences between the workers. However, it appears that Mr. M.P.Agarwal was looking after the aspect with regard to the suit agreement. The plaintiff's witness, Mr. Mehta (P.W.1) has stated that he had contacted M.P.Agarwal with regard to the suit agreement whereupon M.P.Agarwal told him that with regard to labour having consented and handed over to Mr. Mehta (PW-1) the entire file containing the proceedings and correspondence with labour union. Those documents are produced by Mehta (P.W.1). Exhibit P-40 is the letter dated 15.12.1978 addressed

by Mill Mazdoor Sabha to the defendant no.2 which was signed by Pathak, who was General Secretary of the Mill Mazdoor Sabha. In that letter, the Mill Mazdoor Sabha had made reference to a letter dated December, 1978 by the defendant no.1 informing the Mill Mazdoor Sabha that they wanted to close down the factory in view of their having agreed to sell the land of their Mill premises to N.L.Mehta, the plaintiff and by that letter they proposed to the Mill Mazdoor Sabha to agree to the compensation of 60% to be paid to the workers. In reply to this, the mill Mazdoor Sabha referred to their (defendants') letter dated 9.1.1978 and also mentioned that the defendants had agreed to move the factory to another place for providing alternative employment to the workers and to pay full compensation to those workers who decline to have alternative employment. In that letter, the Mill Mazdoor Sabha clarified that they had no objection and by that letter they were consenting to sell the land at Matunga on which factory stands to Shri N.L.Mehta, the plaintiff on the aforesaid condition i.e. providing alternative employment or payment of full compensation. This meant that they were not agreeable to accept 60% of the compensation. This letter therefore clearly mentions that the labours were agreeable to the same on two conditions (1) of alternative employment or (2) payment of full

compensation. The defendants had withheld this correspondence and in haste by their letter dated 15.12.1977 (Ex.P-5) had terminated the contract saying that the labour had not consented.

30. Moreover, the defendants had sent to the plaintiff a copy of the letter dated 10.1.1978 written by Mill Mazdoor Sabha to the defendant No.1. This however seems to be a doctored letter. The genuine letter is produced by the plaintiff from the file of correspondence given by Mr. M.P.Agarwal. The letter is at Exhibit P-28. In the letter at Exhibit P-11, which the plaintiff received from the defendants, there is no reference to post script which is mentioned in the original letter at Exhibit P-28. The original letter is signed by the General Secretary of the Mill Mazdoor Sabha, Mr. Pathak. The post script is as under :-

> "In the discussion you mentioned that in case we agree you would shift the Factory to Andheri or Thana area and provide alternative work to the workers on first priority basis and those workers who do not agree to this you would compensate fully. We are agreeable to this proposal as stated in the presence of the workers and as such we agree to your proposed sale."

This portion is deliberately omitted by the defendants in the copy which was sent to the plaintiff. The genuine letter, Exhibit P-28 is on the letterhead of Mill Mazdoor Sabha and the signature of Mr. Pathak has been verified and identified by the plaintiff's witness (PW.2). This also further makes it clear that it was not the case that the labour were not agreeable for settlement. On the contrary, they were agreeable for the same. The letter at Exhibit P-28 as also at Ex.P-40 show that defendants themselves had stated that they would shift the factory and provide alternative employment to the workers. The only thing that the defendants did was that they were not ready to pay full compensation to those workers who were not ready to take alternative employment and had offered only 60% of the compensation to which the labour union did not agree. This letter being dated 10.1.78 clearly indicates that when the defendants wrote to the plaintiff on 15.12.77, by letter at Exhibit P-5 the talks with the labour for settlement were still going on and it was not the case that the labour had once and for all refused to consent for selling the factory. This shows the conduct of the defendants and corroborates the plaintiff's case that the defendants had backed out once they got the title perfected in them by making payment of Rs.7,50,000/- as was

required to be paid under the consent terms after getting that amount from the plaintiff.

31. In this regard, it is further pertinent to note the contents of the letter dated 25.9.1977, Exhibit P-30. This letter was written by the defendant No.1 to defendant No.2 under the signature of Mr. M.P.Agarwal, Ex-Director of Defendant No.1. Even here, the defendant No.1 had expressed to defendant No.2 that they were selling their right, title and interest in the premises on which the Mill situates and proposed to defendant No.2 that they (defendant No.1) had decided to shift the factory to a site in Bombay and provide alternative employment to the workers or shift the machineries to their sister concern at Surat as majority of the machines erected in the premises belonged to New Era Prints or The Niranjan Mills Pvt.Ltd. In the letter, the defendant No.1 further mentioned that it will not be difficult for them to vacate the premises. By that letter, the defendant No.1 also suggested the defendant No.2 that if the latter agreed, the former would pay to the latter 35% of the net sale price that may be realised on the sale to the plaintiff. This confirms the fact that the defendant No.1 had not only decided to shift the factory to different site, but they also had clear idea in their mind to provide alternative employment

to their workers in defendant No.1 factory or pay full compensation to the workers who are not agreeing to take alternative employment. It is worth noting that there is absolutely no evidence to indicate as to how suddenly within two months after the agreement they changed their mind and backed out on the flimsy ground of labour not agreeing for sale of the premises. As discussed above, the labour not consenting for the sale is a fake ground.

32. To get confirmed from Mr. M.G.Pathak, the then General Secretary of Mill Mazdoor Sabha, the plaintiff had written a letter dated 9.6.1987,Exhibit P-43, that labour had consented for sale of the factory and required Mr. Pathak to confirm the same. In reply to that letter, Mr. Pathak, the General Secretary of Mill Mazdoor Sabha, by their letter dated 10.6.1987 confirmed that they had consented for the closure of the factory provided the workers were paid all their legal dues including gratuity and retrenchment compensation and over and above ex-gratia payment agreed between the Sabha and the Company. The letter further clarifies that the Mill Mazdoor Sabha was sorry that defendant No.1 did not want to pay not only the ex-gratia amount, but also the full legal dues to the workers which was not accepted by the Sabha. The letter further clarifies that thus the defendant No.1

had failed to honour the proviso mentioned in their letter for consent for closure. This also fortifies the case of the plaintiff that the defendants had made no attempts to settle with the labour and get their consent for sale. On the contrary, they backed out on the false pretext of labour not consenting on getting the title to the property cleared by making payment of Rs.7,50,000/- and more so because the prices of the properties then substantially rose.

33. There is one more such instance exposing the aforesaid defence of the defendants. The plaintiff has produced a letter dated 5.12.1977 alleged to have been addressed by the Mill Mazdoor Sabha to the defendant. However, this letter dated 5.12.77 of Mill Mazdoor Sabha is only a typed copy and seems to be not the actual letter issued by Mill Mazdoor Sabha to the defendant No.1. The copy of the letter is produced at Exhibit P-27. The initials which are scored out are identified by witness, Vasant Gupta (PW-2) as being of Mr. D.G.Pathak, the then General Secretary of the Mill Mazdoor Sabha. The manipulation which is apparent is in the portion marked "A". In that letter the portion which is - "unless you provide alternate employment and pay full compensation to those workers who do not want alternate employment as per the law". This was altered to "in accordance with the workers'

representation we have to inform you that we are not agreeable and therefore we cannot give our consent to the sale of the Mill premises." The copy at Exhibit P-27 also bears the post script as "Your proposal to pay 60% compensation only to the workers is not acceptable. Hence we object to the sale". This seems to have not been incorporated in the copy sent by the defendants to show that the labours did not agree for the sale. However, this is a fabrication of the real tenor of the letter of Mill Mazdoor Sabha of 5.12.77 to the plaintiff. This exposes the defendants' case of labour not having consented for the sale. This is absolutely a false defence or false excuse put forth by the defendants to wriggle out of their obligation under the agreement.

34. The letters that are signed by D.G.Pathak have been fully proved through the evidence of one Vasant Gupte (PW-2) who was working then with the Mill Mazdoor Sabha since 1950. Till 1971, he was the Secretary and between 1971 and 1999, he was the General Secretary and thereafter he is President till today. He was well acquainted with the work and signature of Mr. Pathak. He has also stated that he has discussed with Mr. Pathak, the contents of the letter dated 10.1.78, Exhibit 28 and the handwriting as appearing on Ex.27 saying that it is the

handwriting of Mr. Pathak. He also identifies the initials on the typed written portion saying that those initials are of D.S.Pathak. All other correspondence which is signed by D.S.Pathak have been identified and proved his signature. As such, there is no merit in the contentions raised on behalf of the defendants that both these documents are fabricated documents. On the contrary, it has been specifically proved that it is the defendants themselves who had fabricated the important correspondence with plaintiff, particularly the letter dated 5.12.1977 (Annexure 2 to the defendants' letter dated 15.12.77, Exhibit P-5. All this evidence therefore sufficiently indicates that the defendants have committed breach of their obligation under the agreement.

35. It is vehemently submitted on behalf of the defendants that in fact, the factory was running and there were around 400 workers working in the factory at the time when the suit agreement was executed. it is new contention raised on behalf of the defendants that shifting of the factory premises would have incurred the expenses of more than Rs.2 crores and, therefore, it was not possible and the plaintiff's case that it was possible and that the labour had agreed to shifting and accept the alternative employment was totally false. However, this

contention is not supported by the general evidence on record. It has been sufficiently brought in evidence of the defendants' witness, Mr. R.K. Agarwal (DW-1) that in the year 1975-76, 1976-77 and 1977-78, the factory was, in fact, not working at all. As such it was not possible that 400 workers were working in the factory and that the factory was running in profit. A certified copy of the balance sheet of the Company for the year ending 13.9.1975, for the year ending 30.9.1976 and for the year ending 30.7.77 has been produced on record at Exhibits 55, 56 and 57. In the year 1975, there was a loss of Rs.63,164.62. For the year ending 1976, there was loss of Rs.94,833.09 ps. and that the total carried forward loss was Rs.2,63,499.52. The Director's Report annexed to the balance sheet shows that an amount of Rs.13,602.17 ps. remained to be paid towards the Employees Insurance liability on account of earlier arrears. Even the production of the cloth had declined during these years. In the year ending 1976, the production was only of 9852 metres as against the previous years of production was 44823 metres. The figures of sales of finished cloth had also gone down to Rs.1,22,899/- for the year ending 1976 as against the previous year of Rs.4,60,642/- for the earlier year ending on 30.9.1975. The witness admitted that the loss for the year ending 1977 had gone down to Rs.8,55,891.20 ps.

and the total carried forward loss was Rs.12,78,865.50 ps. These figures speak volume to show that the defendants' factory was running in loss and in the last year before the date of agreement, the production was, in fact, nil. Therefore, it is hard to believe the version of the defendants' witness, R.K. Agarwal (DW-1) that about 400 workers were working in the factory.

36. In this regard, there is also evidence that at the most about 68 workers were working in the factory as indicated by the Return of contribution filed by defendant No.1 with the Employees State Insurance Corporation which is produced at Exhibit D-36. It also shows that the working days of the workers were hardly 17. Apart from this, the aforesaid evidence at Exhibits, 55, 56 and 57 in the form of certified copy of the balance sheet, Directors' report and Auditor's report itself make it clear that the production of the cloth in the Mill was going down, sales had gone down and the losses were increasing and lastly losses were running to the extent of Rs.12,78,865.50 ps. A tall claim was made by the defendants' witness, Mr. Agarwal (DW-1) that the financial condition of the defendant No.1 company was sound is also not true in view of the aforesaid evidence of the balance sheet, directors' report and auditor's report. In this

regard, it is to be noted that it is admitted position that the defendants wanted to comply with the consent terms filed in the Suit No.236 of 1968 by making payment of Rs.7,50,000/- for perfecting their title to the suit property. At the time of the suit agreement, it was agreed that the plaintiff shall pay to the defendants this amount with specific understanding that this amount would be utilised for satisfying the obligation of the defendants under the consent terms. It is further admitted position that on payment of this amount by the plaintiff to the defendant No.1, the same was utilised for the purpose of discharging their obligations under the consent terms. This vehemently shows that the defendants did not even have this amount of Rs.7,50,000/- which they were required to take from the plaintiff as earnest money under the suit agreement.

37. All these circumstances, therefore, clearly show that the defendants had committed breach of the suit agreement by cancelling or terminating the agreement on the false pretext that they could not settle with the labour and got the labour consent for the sale of the suit land to the plaintiff.

38. As against this, the plaintiff was always ready and willing to perform his part of the contract. He

had paid earnest money of Rs.7,50,000/- and Rs.4,00,000/- immediately on execution of the agreement by the defendants. The plaintiff's conduct even after receiving the defendants' letter dated 15.12.77, Exhibit P-5, accompanied by the labours' refusal letter dated 5.12.77, he immediately entered into correspondence with the defendants requesting them to fix a meeting with the labour show that they could pursue the matter. The plaintiff also requested the defendants not to withdraw their application for change of user made by them, but the defendants got it withdrawn by writing to the concerned authority on 19.12.1977. The other part of the obligation under the agreement was that the plaintiff was to pay to the defendants half of the balance consideration on the defendants getting permission under the Urban Land Ceiling Act, the permission for change of user and the defendants settling with the labour. The remaining half of the balance consideration was to be paid on getting vacant possession of the land in equal quarterly instalments within a period of one year from the date of possession of the suit property. However, in the meantime, the defendants under the false pretext, terminated the agreement and therefore, there was no question of the plaintiff performing this part of obligation.

39. The defendants having committed breach of the contract surreptitiously by terminating the contract is also indicative from the fact that if they had real intention to terminate the contract or the suit agreement having stood cancelled for want of consent from the labour, they should have immediately returned the earnest money of Rs.11,50,000/-, but they did not do so. They had only intimated by a letter and subsequently during the correspondence ensued between the parties they sent the draft of Rs.1 lakh which the plaintiff had refused to accept as according to them, the contract was still subsisting and they were ready to perform their part of the contract. These circumstances clearly indicated that the plaintiff was ready and willing to perform his part of the contract.

40. Under these circumstances, issues Nos. 4, 7 and 8 shall have to be answered in the affirmative. Under the circumstances, the defendants have failed to prove that the said agreement stood cancelled and terminated as alleged by them. I answer issue No.13 in the negative.

ISSUE NO. 9 :

41. With regard to this issue, it is submitted on behalf of the defendants that in view of the

provisions of Section 16(c) Explanation (ii) of the Specific Relief Act, 1963, the plaintiff must aver performance of, or readiness and willingness to perform the contract according to the agreement. In this regard, there is clear averment in the plaint about plaintiff being ready and willing to perform his part of the contract. Therefore, the defendants cannot get the benefit of this provision.

42. The learned Counsel for the defendants further pointed out the provisions of Section 20(2) (a), (b) and (c) to contend that the plaintiff had unfair advantage over the defendants and that if specific performance is granted, the defendants would suffer hardship and therefore, granting of specific performance would be inequitable when there is no question of there being any unfair advantage to the plaintiff. As discussed above, the defendants' financial condition was steadily going down, the production had almost stopped and they were running into losses. It is under these circumstances that the defendants had decided to sell the property.

43. It is further vehemently submitted on behalf of the defendants that exercising of discretion for granting specific performance is based on existence of the valid and enforceable contract and, in his

submission, in this case, the contract stood cancelled as the labour refused to consent for the same. He also pointed out that the contract was subject to three conditions and there was clear term in the suit agreement of sale that if the defendants could not perform the three conditions, the defendants were not bound to complete the sale and the plaintiff would have right only to get back the earnest money within a period of six months from the expiration of period of nine months within which the three conditions were performed.Therefore specific performance could not be granted. For this purpose, the learned Counsel for the defendants has relied on he judgment of the Apex Court in the case of **Mayawati Vs. Kaushalya Devi, reported in (1990) 3 SCC 1.** The observations of the Apex Court were as under :-

> "8. In a case of specific performance it is settled law, and indeed it cannot be doubted, that the jurisdiction to order specific performance of a contract is based on the existence of a valid and enforceable contract. The Law of Contract is based on the ideal of freedom of contract and it provides the limiting principles within which the parties are free to make their own contracts. Where a valid and enforceable contract has not been made, the court

> swill not make a contact for them. Specific performance will not be ordered if the contract itself suffers from some defect which makes the contract invalid or unenforceble. .."

Here, in this case, it is not the case that the suit agreement was invalid or unenforceable. In fact, it is a valid and enforceable contract. What is submitted on behalf of the defendants is that it would be difficult to enforce the specific performance in absence of the permission under the U.L.C. Act, and the permission to change the use of the suit property. However, these permissions were required to be sought by the defendants after they settled with the labour and got their consent for sale. However, the defendants, as discussed above, did no honest efforts to settle with the labour and on the false pretext of labour having not consented terminated the contract. The defendants, therefore, cannot take benefit of this observation of the Apex Court.

44. As against this, the learned Counsel for the plaintiff vehemently submitted that normally, in cases of contract of sale of immovable property, the specific performance should be granted. He points out the provisions of Section 20(2) of the Specific Relief Act and states that in clauses (a), (b) and (c) of

sub-section (2) of Section 20, three types of cases are specified where the Court may properly exercise discretion not to grant specific performance. He submits that the defendants' case does not fall in any of these clauses. In the present case, though argued on behalf of the defendants, the plaintiff had option in fact no unfair advantage over defendants.There is nothing on record to show that the plaintiff had such unfair advantage over the defendants. In fact, the defendants' financial condition was deteriorating and it is therefore they decided to sell the suit property. As regards clause (b), the defendants have failed to show any hardship that may be caused to them. It is also not clear as to how granting of specific performance would be inequitable to the defendants. Even in respect of any of these three grounds, there is no pleading raised by the defendants. Therefore, the defendant cannot get advantage of the provisions of these clauses.

45. The learned Counsel for the plaintiff also points out that in the present case, the discretion cannot be in favour of the defendants as the defendants have manipulated letters from the Union and put forth a false pretext for terminating the contract on the ground that labour had not consented for the sale. He also further submits that the defendants had

suppressed material evidence in the form of letters written to them by the Union that they were agreeable for sale provided alternative employment is given to the workers or workers were given full compensation. This suppression was malafide and it was for the purpose of avoidng the contract. The defendants had thus put up a false pretext for wriggling out of the contract. In his submission, the defendants had put a false story of loss of documents. I find much force in the submission made on behalf of the plaintiff.

46. The learned Counsel for the plaintiff further submits that certain obligations are required to be performed by the defendants under the agreement. Even then the specific performance cannot be refused on that count. In this regard, he relied on the decision of the Apex Court in the case of **Mrs. Chandnee Widya Vati Madden vs. Dr. C.L. Katial and others** reported in AIR 1964 SC 978. The relevant observations of the Apex Court are as under :-

> "(4). The main ground of attack on this appeal is that the contract is not enforceable being of a contingent nature and the contingency not having been fulfilled. In our opinion, there is no substance in this contention. So far as the parties to the contract are concerned, they had

agreed to bind themselves by the terms of the document executed between them. Under that document it was for the defendant to make the necessary application for the permission to the Chief Commissioner. She had as a matter of fact made such an application but for reasons of her own decided to withdraw the same. On the findings that the plaintiffs have always been ready and wiling to perform their part of the contract, and that it was the defendant who wilfully refused to perform her part of the contract, and that time was not of the essence of the contract, the Court has got to enforce the terms of the contract and to enjoin upon the defendant to make the necessary application to the Chief Commissioner. It will be for the Chief Commissioner to decide whether or not to grant the necessary sanction."

"(5) In this view of the matter, the High Court was entirely correct in decreeing the suit for specific performance of the contract. The High Court should have further directed the defendant to make the necessary application for permission to the Chief Commissioner, which was implied in the contract between the parties. As the defendant, without any sufficient reasons,

withdrew the application already made to the Chief Commissioner, the decree to be prepared by this Court will add the clause that the defendant, within one month from today, shall make the necessary application tot the Chief Commissioner or to such other competent authority as may have been empowered to grant the necessary sanction to transfers like the one in question and further that within one month of the receipt of that sanction she shall convey to the plaintiffs the property in suit. In the event of the sanction being refused, the plaintiffs shall be entitled to the damages as decreed by the High Court. The appellant sought to raise certain other pleas which had not been raised in the High Court; for example, that this was not a fit case in which specific performance of contract should be enforced by the Court. This plea was not specifically raised in the High Court and the necessary facts were not pleaded in the pleadings. It is manifest that this Court should not allow such a plea to be raised here for the first time."

47. The learned Counsel for the plaintiff has also further relied on the decision of the Delhi High Court in the case of **Shri Rajesh Aggarwal vs. Shri Balbir**

Singh and another reported in AIR 1994 Delhi 345. In that case, there was a condition to obtain income-tax clearance. The Court observed that as a result of this condition, the agreement to sell does not become illegal and the Court is empowered to give suitable directions regarding obtaining of permission from the appropriate authority.

48. Another judgment is in the case of **Ajit Prashad Jain vs. N.K.Widhani and others** reported in AIR 1990 Delhi 42. This decision has been based on the decision of the Apex Court in the case of Mrs. Chandnee Widya Vati Madden's case (supra). The relevant observations are as under :-

> "...It is equally well-settled that in cases of contracts for sale of immovable properties the grant of relief of specific performance is a rule and refusal an exception on valid and cogent grounds shown."

It is further observed as under :-

> "21. The permission from Land and Development Office is not a condition precedent for grant of decree for specific performance. In Mrs. Chandnee Widya Vati Madden v. Dr. C.L. Katial,

(1964) 2 SCR 495 : (AI?R 1965 SC 978) the Supreme Court confirmed the decision of the Punjab High Court holding that if the Chief Commissioner ultimately refused to grant the sanction to the sale the plaintiff may not be able to enforce the decree for specific performance of the contract but that was no bar to the court passing a decree for that relief. The same is the position in the present case. If after grant of the decree of specific performance of the contract the land and Development Office refuses to grant permission for sale the decree may not be in a position to enforce the decree but it cannot be held that such a permission is a condition precedent for passing a decree for specific performance of the contract. I may also notice that S. 27(1) of the Urban Land (Ceiling and Regulation) Act, insofar as it imposes a restriction on transfer of any urban or unbanisable land with a building or a portion of such building, which is within the ceiling area, was declared invalid by Supreme Court in Maharo Saheb Shri Bhim Singhji v. Union of India, AIR 1981 SC 234 and as such it may not be necessary to obtain permission under the said Act but that is not a matter with which I am concerned at this stage. Assuming such a permission is required

that would be a matter for consideration after passing of the decree an at the stage of execution. No fault can be found out with the plaintiff's anxiousness to take possession in terms of the agreement on payment of the amounts stipulated therein."

49. This being the agreement of sale of immovable property, the specific performance has to be granted as of rule unless there are valid grounds to refuse. In this case, as discussed above, there are no valid grounds to refuse specific performance in favour of the plaintiff. The conduct of the defendants was avoiding the contract on false pretext and it is, therefore, very much in favour of the plaintiff to make him entitled to get specific performance of the agreement. Under the circumstances, I am inclined to grant specific performance of the suit agreement dated 19.10.1977, Exhibit P-1. The defendants could be directed to obtain the permissions under the U.L.C. Act, for change of user. The third condition does not survive as the same waived by the plaintiff. Therefore, this issue is answered in the affirmative.

ISSUES NOS. 10 & 11 :

50. These are alternative reliefs claimed by the

plaintiff. Since I am granting specific relief in favour of the plaintiff, these issues, in fact, do not arise. However, in case of different view of the matter, I record my findings on these issues also. It is obvious that the defendants would be liable to refund the amount of Rs.11,50,000/- with interest at 18% per annum from the date of the suit till realisation. Since the goods are hypothecated with the plaintiff, there also would be a charge on the suit property as claimed by the plaintiff. However, I answer that these issues do not arise in view of the answer to issue No.9.

ISSUE NO. 12 :

51. Since I am granting specific performance, this issue also does not arise. However, in case of different view of the matter and in case the specific performance does not work out, I have to record my findings on this issue. The plaintiff has claimed Rs.78,06,600/- or any other sum by way of damages for the breach of the agreement of sale committed by the defendants. In this regard, the learned Counsel for the plaintiff has vehemently submits that while calculating compensation, it is necessary to consider the present market value of the suit property. According to him, the plaintiff’s witness has stated

that the present market value of the property is Rs.31 crores and the same should be awarded in favour of the plaintiff. In this regard, however, the plaintiff's witness only made a statement without leading any evidence as to how he has arrived at the market value of Rs.31 crores. The compensation by way of damages could be awarded under the provisions of Section 73 of the Contract Act. Section 73 reads as under :-

> "73. Compensation for loss or damage caused by breach of contract - When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.
>
> Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."

It provides that the compensation for any loss or damage caused to the plaintiff could be such as would naturally arose in the usual course of things from such breach. To my mind, the plaintiff suffered loss

or damage of getting suit property by paying the agreed consideration and the plaintiff would have been the owner of the property worth as per the agreement. The plaintiff is restricting the claim to that extent only. Therefore, the plaintiff would be entitled not to the market price of the property as it prevails today, but only to rs.78,06,600/-. I however answer this issue as does not arise in view of the answer to issue No.9.

52. Hence, the order :-

> The Plaintiff's suit is decreed in terms of prayer (a). It is directed that the defendants shall apply to the concerned authorities for getting permission under the provisions of Sections 22 and 27 of the Urban Land (Ceiling & Regulation) Act, as also for getting permission for conversion of industrial/commercial use to the residential use of the suit property within eight weeks from today. In the event, the permission as stated above is not granted by either of the Authorities, there shall be a decree in terms of prayer clause b(i) to b(v), as observed above.
>
> The defendants shall also pay the Plaintiffs

costs.

In case the decree in terms of prayer clause (b) takes effect, the amount deposited by the defendants in Court along with the interest shall be adjusted towards the amount due to the Plaintiffs.

Decree be drawn up accordingly.

The larned Counsel for the defendants submits that this Order may be stayed for a period of twelve weeks as the defendants want to file Appeal against this Order. The learned counsel for the Plaintiff has no objection for the same. The operation of the aforesaid Order shall stand stayed for a period of twelve weeks from today.

Certified Copy expedited.

(S.K.SHAH,J.)